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Supreme Court, U.S.
FILED

No. 931831 MAY 17 1994

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

WILLIAM ADAMS,

Petitioner,

-vs-

STATE OF MICHIGAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

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69 pp

QUESTION PRESENTED FOR REVIEW

WHETHER THERE WAS PROBABLE CAUSE TO ISSUE A SEARCH WARRANT FOR A PRIVATE RESIDENCE WHERE, TWO DAYS PRIOR TO THE SEARCH, AN OFF-DUTY POLICE OFFICER OVERHEARD A SUSPICIOUS TELEPHONE CONVERSATION IN A SHOPPING MALL, AND FOLLOWED THE CONVERSANTS BACK TO AN APARTMENT COMPLEX IN DETROIT, MICHIGAN, BUT DID NOT OBSERVE ANY UNUSUAL PATTERN OF TRAFFIC OR OTHER ACTIVITY WHICH WOULD LEAD A REASONABLE PERSON TO CONCLUDE THAT NARCOTICS WOULD BE FOUND IN PETITIONER'S APARTMENT.

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No.

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SUPREME COURT OF THE UNITED STATES

October Term, 1993

WILLIAM ADAMS,

Petitioner,

-vs-

STATE OF MICHIGAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

Petitioner WILLIAM ADAMS, through his attorneys, GERALD A. SNIDERMAN and R. STEVEN WHALEN, respectfully asks that this Court issue a Writ of Certiorari to review the judgment of the Supreme Court of the State of Michigan.

OPINIONS BELOW

The full text of the December 21, 1993 order of the Michigan Supreme Court reversing, by a 4-2 vote, the Michigan Court of Appeals and reinstating Petitioner's conviction, is reproduced in the Appendix, page 1a.

The full text of the April 7, 1993 opinion of the Michigan Court of Appeals reversing Petitioner's conviction by a 2-1 vote is reproduced in the Appendix, page 2a.

The full text of the February 25, 1994 order of the Michigan Supreme Court denying reconsideration is reproduced in the Appendix, page 14a.

STATEMENT OF JURISDICTION

The judgment of the Michigan Supreme Court reinstating Petitioner's conviction was entered on December 21, 1993.

Petitioner's timely motion for reconsideration was denied by order entered on February 25, 1994.

This Court's jurisdiction is invoked under 28 U.S.C. sec. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Manner in which federal question was raised in the state courts

Petitioner was charged in the Recorder's Court for the City of Detroit, Michigan with the felony offense of possession with intent to deliver more than 650 grams of a mixture containing cocaine, M.C.L. 333.7401(1) and M.C.L. 333.7401(2)(a)(i); M.S.A. 14.15 (7401)(1) and M.S.A. 14.15 (7401)(2)(a)(i). By way of a motion to suppress evidence in the trial court, Petitioner challenged, on Fourth Amendment grounds, the execution of a search warrant at his apartment in Detroit, Michigan. Following an evidentiary hearing, the trial

court denied Petitioner's motion to suppress evidence.

Petitioner then proceeded to trial, and was convicted as charged by a jury. Following sentencing, he took an appeal by right to the Michigan Court of Appeals, challenging the execution of the search warrant under both the Fourth Amendment and under Michigan law. The Court of Appeals reversed his conviction, ruling that there was no substantial basis for finding probable cause to issue the search warrant. One Court of Appeals judge dissented from this opinion. The Court of Appeals based its ruling on Michigan law as set forth in People v. Russo, 439 Mich. 584, 487 N.W.2d 698 (1992)

The prosecution then filed a delayed application for leave to appeal to the Michigan Supreme Court. Petitioner filed a response which argued both Michigan and federal constitutional law. (Petitioner's response in the Michigan Supreme Court is reproduced in the Appendix, page 16a). The Michigan Supreme Court reinstated the Petitioner's conviction "for the reasons stated in the dissenting opinion in the Court of Appeals."

Subsequently, the Michigan Supreme Court denied Petitioner's timely motion for reconsideration.

Facts

The cocaine which formed the basis of Defendant's conviction was seized pursuant to a search warrant which was issued on February 10, 1988. Prior to trial, Defendant moved to suppress all evidence seized pursuant to the warrant, based on the insufficient and defective nature of the affidavit in support of the warrant. The affiant for the warrant was August Bernhard, a Detroit police officer. (The affidavit in support of the search warrant is reproduced in the Appendix, page 32a).

In his affidavit, Officer Bernhard alleged that on the afternoon of February 8, 1988 (two days before the search warrant was issued), while off-duty, he was shopping for boots at a store in the Eight Mile-Farmington Road area of Detroit. He said that he saw three "black males" enter the store, and noted that they wore full coats, some gold jewelry, and "Rolex type" watches. Bernhard also stated that, like himself, the subjects were there to purchase boots, and were "looking at ones running

some $250-300." Bernhard stated that two of the three subjects had pagers, and the third had a cellular telephone. Bernhard claimed to have overheard one call, in which one subject told someone to "give him the other half 'ki'." The caller went on to say, "we'll be at the apartment in about 15 minutes," and also said something about meeting at a carwash.

According to Bernhard's affidavit, he left the store and set up what he called "surveillance." He observed the three subjects leave the store and enter an automobile. However, the affidavit does not state how much time elapsed between when Bernhard overheard the telephone conversation and when the subjects left the store. Bernhard followed the subjects to the Sherbrooke Apartments in Detroit. He observed the subjects remove something from the trunk, which he stated were "probably packages from the boot store." He stated that after changing his location, he observed the subjects enter apartment 201. Bernhard stated that each apartment in the complex had a separate, outside entrance, and that apartment 201 had some sort of grate. He said that "only a few" of the apartments had grates.

Bernhard said that when he returned to where he had seen the subjects park the car, it was gone. He did not observe which of the three subjects, if any, drove the car away, and he could not say who, if anyone, remained in apartment 201.

Based on these facts, Bernhard concluded that apartment 201 was a "stash house," and that narcotics and related items would be found there two days after his observations.

Although the trial judge denied the motion to suppress, he repeatedly called the issue of probable cause a "close question" (Transcript of 3-3-89, 9, 14, 21). Referring in particular to Defendant's argument that probable cause, if it existed at all, was stale, because the warrant was issued two days after Officer Bernhard's observations, the trial judge stated, "Now, I've already said it's a close question. If I were sitting down and I were the one signing the warrant, and I say this for the record, I might have some serious questions about whether I would draw the inference there." (Transcript of 3-3-89, 21).

The Court of Appeals reversed Defendant's conviction, holding, in a 2-1 decision:

"We agree with defendant that the information on which the search warrant was based was stale. The magistrate should not have issued the warrant and the trial court erred in refusing to suppress the evidence and quash the warrant."

REASONS FOR ALLOWANCE OF THE WRIT

The decision of the Michigan Supreme Court in this case is in conflict with this Court's decisions in Illinois v. Gates[1] and Sgro v. United States[2].

In Gates, this Court adopted a totality of the circumstances test in assessing whether or not a search warrant affidavit establishes probable cause. This Court stated:

> "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had

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[1] 462 U.S. 213 (1983).

[2] 287 US 206 (1932).

a 'substantial basis for...concluding' that probable cause existed." (Emphasis added).

Probable cause or information which is stale--that is, which existed remote in time from the issuance of the warrant--may render a warrant invalid. In Sgro, this Court stated:

> "...[I]t is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time...The new warrant must rest upon a proper finding and statement by the commissioner that probable cause then exists. That determination, as of that time, cannot be left to mere inference or conjecture."

In the present case, the information provided by Officer Bernhard, which was two days old by the time he swore out his affidavit, did not provide a substantial basis for concluding that drugs would be found in Petitioner's apartment. It is important to note that for Fourth Amendment purposes, the ultimate question for the magistrate was not whether Petitioner was a drug dealer, or whether he generally engaged in illegal activity, but whether there was probable cause to believe that drugs would be found in his apartment on a particular date.

In purporting to apply a "substantial basis" test, the dissent in the Michigan Court of Appeals, which was adopted by the Michigan Supreme Court, relied heavily on the affiant's observation of three black males, wearing expensive clothing and jewelry, shopping for boots in an apparently upscale shoe store. The affiant also observed that two of the men had pagers, and one had a portable telephone. The affiant-officer also claimed to have heard the man with the cellular telephone make a call in which he said, "Give him the other half 'ki'," and "We'll be at the apartment in about 15 minutes." The officer said that he heard something about meeting at a carwash.

Putting the alleged telephone conversation aside, there is nothing about the clothing of the individuals, their jewelry, their taste in expensive footwear, or their use of pagers or cellular phones which would permissibly raise a suspicion of criminal activity. Given the pervasiveness of these accoutrements, they would be suspicious only if one subscribed, consciously or unconsciously, to the prejudice that a black man would possess these things only if he were a drug dealer. Imagine this scenario:

an off-duty officer observes three smartly dressed, middle-aged white women, all wearing expensive jewelry and furs, shopping for $2,500 boots at Nieman-Marcus. One of the women makes a call on a cellular telephone. Petitioner respectfully suggests that the officer would not even think twice about this, much less feel compelled to eavesdrop on the telephone conversation.

An overheard telephone conversation directing someone to give someone else "the other half 'ki'" is, of course a different matter, and Petitioner agrees that the statement, if actually made, is suspicious. In fact, the Court of Appeals majority in this case agreed that the telephone conversation was suspicious. However, assuming that a magistrate might conclude from this statement that the Petitioner sells drugs, there were no further observations which would link Apartment 201 of the Sherbrooke Apartments in Detroit to any drug transaction. In the officer's mind, the only unusual thing about that apartment was the presence of security grates. As the Court of Appeals majority noted, "If grated doors are evidence of criminal activity how do we explain the plethora of steel grates on doors throughout

metropolitan Detroit?" [3] There were also contraindications that the apartment was a "stash house": there was no unusual pattern of traffic, and the only thing carried into the apartment was a bag from the shoe store. This indicates a residence, not a stash house.[4] Further, there is nothing, short of the officer's speculation or perhaps wishful thinking, to objectively indicate that any contraband would be in the apartment two days after the observations.

Again, the salient question is not whether the Defendant was a drug dealer, but whether drugs would be found in Apartment 201 of Sherbrooke Apartments on a particular date. Contrary to the suggestion in the Court of Appeals dissent, the suspects' attire and taste in boots does not increase the

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[3] Returning to the example of the three expensively dressed white women, would the officer find it suspicious if he observed them enter a house in an exclusive suburb which was protected by an expensive security system?

[4] Even drug dealers must live somewhere, and if the officer were truly familiar with drug operations, he would admit that a "stash house" is usually separate from the residence of a dealer.

probability that drugs would be found in the apartment. In this regard, the Court of Appeals majority was correct in stating:

> "Although there may have been reason to believe that defendant and his companions were drug dealers, there was no reason to believe that the apartment in question was the location of a continuing criminal enterprise. There was no observation of a stream of visitors or any other evidence to suggest continuing criminal activity at the apartment. There was nothing to suggest that illegal narcotics were present in the apartment on February 8, 1988, or that, if present, the drugs would remain there until February 10, the day of the search. The officer saw no illegal substance and his conclusion that the apartment was used as a 'stash' house was mere speculation." (Emphasis added).

In addition, the officer's suspicion that the overheard telephone call was the preface to an imminent drug transaction was too stale to support a finding of probable cause two days later. There is, of course, no hard and fast rule as to how fresh information must be to support probable cause. Under Sgro and Gates, that determination will depend on the facts of each

case, and there may be situations involving a clear showing of ongoing criminal activity where 2-day old information may be sufficiently corroborated to show probable cause. In the present case, however, apart from the overheard conversation in the shoe store, there is absolutely nothing in the affidavit which would lead a person of reasonable caution to conclude that drugs would be found in apartment 201 two days later. Furthermore, there was nothing to show ongoing criminal activity in apartment 201 of Sherbrooke Apartments.

As the Court of Appeals majority noted, Officer Bernhard's affidavit is noteworthy for the information it does not contain. No sales, controlled or otherwise, were observed in the apartment. There was no pattern of heavy traffic, nor any other evidence of continuing criminal activity in the apartment. In fact, there was apparently no surveillance or investigation whatsoever in the two days between Bernhard's observations and the issuance of the search warrant. In short, there is nothing to show a pattern of criminal activity in apartment 201, other than the

officer's speculation. Under Sgro, "inference and conjecture" does not equal probable cause.

The divided nature of the state appellate court opinions in this case (the Court of Appeals rejecting the probable cause determination in a 2-1 vote, and the Michigan Supreme Court reversing the Court of Appeals in a 4-2 vote) suggests that the concept of "substantial basis" articulated in Illinois v. Gates and the idea of staleness discussed in Sgro v. United States should be be revisited and clarified by this Court. The majority decision of the Michigan Supreme Court in this case conflicts with Gates and Sgro, and Petitioner respectfully asks that this Court review the conflict, and reverse the judgment of the Michigan Supreme Court.

CONCLUSION

WHEREFORE, Petitioner WILLIAM ADAMS asks that this Honorable Court grant a writ of certiorari and reverse the judgment of the Michigan Supreme Court.

Respectfully submitted,

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Dated: May 13, 1994

APPENDIX

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Michigan Supreme Court
Lansing, Michigan

Order

Entered:
December 21, 1993

Michael F. Cavanaugh
Chief Justice
Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallet, Jr.
Associate Justices

96639

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,
v
WILLIAM ADAMS,
Defendant-Appellee.

SC: 96639
COA: 127760
LC: 88-013582

On order of the Court, the application for leave to appeal is considered and, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals and REINSTATE the judgment of the Recorder's Court for the City of Detroit for the reasons stated in the dissenting opinion in the Court of Appeals.

Cavanaugh, C.J., and Levin, J., would deny or grant leave to appeal and dissent from the peremptory reversal of the Court of Appeals.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

April 7, 1993

v

No. 127760

WILLIAM ADAMS,

Defendant-Appellant.

Before: Holbrook, Jr., PJ, and Sullivan and Taylor, JJ.

PER CURIAM

Defendant was convicted by a jury of possession with intent to deliver 650 or more grams of cocaine MCL 333.7401(2)(a)(i); MSA 14.15 (7401)(2)(a)(i), and sentenced to the mandatory term of life imprisonment without parole. He appeals as of right. We reverse.

We agree with defendant that the information on which the search warrant was based was stale. The magistrate should not have issued the warrant and the trial court erred in refusing to suppress the evidence and quash the warrant.

We review a magistrate's decision to issue a warrant to determine whether a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause to issue the warrant. People v Russo, 439 Mich 584, 603; 487 NW2d 698 (1992). Probable cause to search is concerned with whether certain identifiable objects are probably to be found at the present time in a certain identifiable place. Id, p 605. A delay between obtaining the information and issuing the warrant is not necessarily fatal, but is a factor in the determination of probable cause to search. Id.

In this case, the warrant was issued two days after a police officer observed defendant engaged in suspicious behavior. The officer's attention was drawn to the three individuals because of their lavish clothing and gold chains. The overheard conversation reasonably convinced him that these individuals were involved in narcotics transactions. However, it is a major leap to conclude that because these individuals then went to an apartment with a security steel grating over the door, that the apartment was a "stash" house.

Although there may have been reason to believe that defendant and his companions were drug dealers, there was no reason to believe that the apartment in question was the location of a continuing criminal enterprise. There was no observation of a stream of visitors or any other evidence to suggest continuing criminal activity at the apartment. There was nothing to suggest that illegal narcotics were present in the apartment on February 8, 1988, or that, if present, the drugs would remain there until February 10, the day of the search. The officer saw no illegal substance and his conclusion that the apartment was used as a "stash" house was mere speculation.

The trial court relied heavily on the fact that there were steel grates on the door of the apartment. If grated doors are evidence of criminal activity how do we explain the plethora of steel grates on doors throughout metropolitan Detroit?

Drugs were found in apartment 201. Whose stash was it? There is no direct evidence establishing that this defendant was the possessor of the narcotics. This is the stubborn fact.

Ongoing criminal activity is not established by the presence of security grates nor is it established by the appearance of defendant and his companions. While security devices are common throughout the area, defendant's appearance and use of the phone, his overheard conversation, and beepers suggest that defendant is a drug dealer. This inference, however, does not in turn lead to a reasonable inference that defendant engaged in criminal activity or stored drugs at Apartment 201 on the date the warrant was issued.

Reversed.

/s/ Donald E. Holbrook, Jr.
/s/ Joseph B. Sullivan

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

April 7, 1993

v

No. 127760

WILLIAM ADAMS,

Defendant-Appellant.

Before: Holbrook, PJ, and Sullivan and Taylor, JJ.

TAYLOR, J. (Dissenting)

I disagree with the majority's conclusions that the warrant was issued improperly because the information upon which it was based was stale, and that there was insufficient evidence adduced at trial showing that defendant possessed that cocaine to support the conviction.

I would hold that the magistrate properly issued the search warrant despite the fact that the information upon which the warrant was issued was two days old. A search warrant and the underlying affidavit are to be read in a common-sense and realistic manner. We afford deference to the magistrate's

decision, and must determine whether a reasonable magistrate could have found a substantial basis to infer the evidence of ongoing narcotics trafficking would be found in an apartment two days after defendant and others were seen entering it. People v Russo, 439 Mich 584, 604-605; 487 NW2d 925 (1992).

The affidavit supporting the warrant indicates that the affiant, a narcotics officer with the Detroit Police Department, went to a store to buy boots on February 8, 1988, while off-duty. There he saw three men enter the store who were dressed in fur coats, gold chains and gold Rolex-type watches, and who were considering buying boots costing $250 to $300. Two of the men had pagers and one had a portable cellular telephone. The pagers went off and several calls were made. The officer heard part of one call made in the boot store by the man with the cellular telephone later identified as defendant. During this call, defendant said, "Give him the other half 'ki'...Do you have his number? If you don't I'll put it on your beeper...We'll be at the apartment in about 15 minutes." Defendant went on to say something about meeting "at the carwash."

The officer's experience led him to suspect that a drug deal was in progress in light of the overheard telephone conversation and the dress, equipment and actions of the men. Therefore, he positioned himself to watch the three men leave the store and get into a white 1987 Acura automobile. He followed them to an apartment where he saw the men get out of the car, remove what he thought were packages from the boot store from the trunk, and go into the front of apartment 210. This apartment has elaborate grates, unlike all the surrounding apartments that for the most part had no grates at all. When the officer returned to the position from which he could see the Acura where it had been parked at the back of the building, the Acura was gone.

Also included in the affidavit was the officer's conclusion that the three men had rushed from the store to retrieve drugs from the apartment, which he believed was being used as a safe or "stash" house, then delivered the drugs elsewhere, i.e., at a carwash. This latter conclusion was based on the affiant's "personal knowledge that carwashes are often used as narcotic

transfer points because their interiors are difficult for police to observe and a high traffic volume is common."

The fact that forty-eight hours elapsed between the time the officer observed the men and the issuance of the warrant is not dispositive.

> Time as a factor in the determination of probable cause to search is weighed and balanced in light of other variables in the equation, such as whether the crime is a single instance or an ongoing pattern of protracted violations, whether the inherent nature of a scheme suggests that it is probably continuing, and the nature of the property sought, that is, whether it is likely to be promptly disposed of or retained by the person committing the offense. The matter must be determined by the circumstances of each case. [People v Russo, supra. 439 Mich at 605-606.]

The presence of the security grate at the apartment, the lavish clothing and the beepers and cellular telephone, as well as the relatively large quantity of contraband being discussed, all lead me to conclude that there was ongoing criminal activity at the apartment.

The fact that the apartment was equipped with an elaborate security grating in an area in which no other apartments were equipped with any grating at all suggests that

the apartment was being used for ongoing criminal activity because such precautions would not be necessary if the apartment was used on a onetime basis for a drug transaction. The three men observed using the apartment all wore flashy and expensive clothing, and were living a lavish life-style. They were in possession of electronic equipment showing a steady pattern of business activity involving an illegal occupation.

Every indication of continuity is present here, and no indication that the narcotics activity was transitory. It is readily apparent that these three men were involved in dealing large amounts of narcotics on an ongoing basis, and that the apartment was there warehouse.

In summary, I would hold that the affidavit in support of the search warrant contains evidence establishing a sufficiently substantial basis of probable cause to conclude that the evidence sought might be found at the apartment. The conversation the officer overheard being made on the cellular telephone in which defendant told someone to give "him" the other "half 'ki'", viewed in conjunction with the equipment, dress, and actions of

all three men, leads me to conclude that the search warrant was properly issued.

I also disagree with the majority holding that there was insufficient evidence adduced at trial to establish defendant's constructive possession of the cocaine found in the apartment.

As the police were executing the search warrant, they saw defendant and another man approaching the apartment. Defendant inserted a key in the door, then opened and entered, but fled when the officers announced there presence. These facts, along with the earlier observations of defendant and his cohorts and the overheard conversation on the cellular telephone, are sufficient to demonstrate defendant's knowledge, proximity and accessibility of the drug. People v Petrella, 424 Mich 221, 268-270; 380 NW2d 11 (1985); People v Hill, 433 Mich 464, 469-470; 446 NW2d 140 (1989); People v Sammons 191 Mich App 351, 371; 478 NW2d 901 (1991), lv den 439 Mich 933 (1992).

Defendant's last claim concerns the mandatory life sentence without possiblity of parole imposed in this case which

he contends is disproportionately harsh, cruel, and unusual. Our Supreme Court recently held that the mandatory life in prison term for convictions of possession of 650 or more grams of cocaine, MCL 333.7403(2)(a)(i); MSA 14.15(7403)(2)(a)(i), was cruel and unusual punishment under the Michigan Constitution[1] in People v Bullock, 440 Mich 15; 485 NW2d 866 (1992). Recently, a panel of this Court extended the Bullock analysis to partially invalidate sentences of life without parole imposed for convictions of delivery of 650 or more grams of cocaine. People v Fluker, ___ Mich App ___; ___ NW2d ___ (Nos. 131295, 131513, 131517, rel'd 12/7/92), lv pdg. If Fluker is followed defendant will be eligible for parole after completing ten calendar years of his sentence.

However, an earlier panel of this court held that the mandatory life sentence without possibility of parole passed constitutional muster in cases of delivery of 650 or more grams of a controlled substance. People v Alexander, 188 Mich App 96, 106; 469 NW2d 10 (1991). Under AO-1990-6, Alexander

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[1]Const 1963, art 1, § 16.

is binding precedent on this issue. This is so despite Bullock because our Supreme Court appears to limit its holding to cases of possession, id., 37-38, and because the Bullock court's analysis centered on People v Lorentzen, 387 Mich 167; 194 NW2d 827 (1972). I would conclude that Alexander, which is based in large measure on the progeny of Lorentzen, survives Bullock on the issue presented.

Accordingly, I would affirm on all issues.

/s/ Clifford W. Tayor

Michigan Supreme Court
Lansing, Michigan

Order

Entered:
February 24, 1994

Michael F. Cavanaugh
Chief Justice
Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallet, Jr.
Associate Justices

96639(38)

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant,

v

SC: 96639
COA: 127760
LC: 88-013582

WILLIAM ADAMS,

Defendant-Appellee.

On order of the Court, the motion for reconsideration of this Court's order of December 21, 1993 is considered. The order is amended to show Justice Boyle as not participating in the order to correct a clerical error. In all other respects, the motion for reconsideration is DENIED because it does not otherwise appear that the order was entered erroneously.

Boyle, J., not participating.

Levin, J., would grant reconsideration, and either deny or grant leave to appeal, and dissents from the peremptory reversal of the Court of Appeals.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

WILLIAM ADAMS,

Defendant-Appellee.
_____ /

S.Ct. No.
C.A. No. 127760
L.C. No. 88-13582

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BRIEF IN OPPOSITION TO DELAYED APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF FACTS

Defendant-Appellee WILLIAM ADAMS was convicted by a jury in the Recorder's Court for the City of Detroit, the Honorable Terrance K. Boyle, presiding, of possession with intent to deliver more than 650 grams of a mixture containing cocaine, MCL 333.7401(1) and MCL 333.7401(2)(a)(i); MSA 14.15 (7401)(1) and MSA 14.15 (7401)(2)(a)(i). He was sentenced to mandatory life imprisonment without parole.

The cocaine which formed the basis of Defendant's conviction was seized pursuant to a search warrant which was issued on February 10, 1988. Prior to trial, Defendant moved to suppress all evidence seized pursuant to the warrant, based on the insufficient and defective nature of the affidavit in support of the warrant. The affiant for the warrant was August Bernhard, a Detroit police officer. **A copy of the search warrant affidavit is appended to this Brief.**

In his affidavit, Officer Bernhard alleged that on the afternoon of February 8, 1988 (two days before the search warrant was issued), while off-duty, he was shopping for boots

at a store in the Eight Mile-Farmington Road area. He said that he saw three "black males" enter the store, and noted that they wore full coats, some gold jewelry, and "Rolex type" watches. Bernhard also stated that, like himself, the subjects were there to purchase boots, and were "looking at ones running some $250-300." Bernhard stated that two of the three subjects had pagers, and the third had a cellular telephone. Bernhard claimed to have overheard one call, in which one subject told someone to "give him the other half 'ki'." The caller went on to say, "we'll be at the apartment in about 15 minutes," and also said something about meeting at a carwash.

According to Bernhard's affidavit, he left the store and set up what he called "surveillance." He observed the three subjects leave the store and enter an automobile. However, the affidavit does not state how much time elapsed between when Bernhard overheard the telephone conversation and when the subjects left the store. Bernhard followed the subjects to the Sherbrooke Apartments in Detroit. He observed the subjects remove something from the trunk, which he stated were

"probably packages from the boot store." He stated that after changing his location, he observed the subjects enter apartment 201. Bernhard stated that each apartment in the complex had a separate, outside entrance, and that apartment 201 had some sort of grate. He said that "only a few" of the apartments had grates.

Bernhard said that when he returned to where he had seen the subjects park the car, it was gone. He did not observe which of the three subjects, if any, drove the car away, and he could not say who, if anyone, remained in apartment 201.

Based on these facts, Bernhard concluded that apartment 201 was a "stash house," and that narcotics and related items would be found there two days after his observations.

Although the trial judge denied the motion to suppress, he repeatedly called the issue of probable cause a "close question" (Tr. 3-3-89, 9, 14, 21). Referring in particular to Defendant's argument that probable cause, if it existed at all, was stale, because the warrant was issued two days after Officer Bernhard's observations, the trial judge stated, "Now, I've already said it's a close question. If I were sitting down and I were the one

signing the warrant, and I say this for the record, I might have some serious questions about whether I would draw the inference there." (Tr. 3-3-89, 21).

The Court of Appeals reversed Defendant's conviction, holding:

> "We agree with defendant that the information on which the search warrant was based was stale. The magistrate should not have issued the warrant and the trial court erred in refusing to suppress the evidence and quash the warrant." Slip Opinion, p. 1.

The prosecutor filed an untimely, or delayed application for leave to appeal, stating that the delay was due to "time needed to review the opinion of the Court of Appeals," as well as the press of other cases.

I. THE COURT OF APPEALS CORRECTLY REVERSED DEFENDANT-APPELLEE'S CONVICTION, WHERE THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT, SIGNED TWO DAYS AFTER THE AFFIANT MADE CERTAIN OBSERVATIONS, WAS INSUFFICIENT TO SHOW A SUBSTANTIAL BASIS FOR FINDING PROBABLE CAUSE.

As the Court of Appeals noted in this case, Officer Bernhard made certain observations, including an overheard conversation on a cellular telephone, which raised a suspicion that the three people he saw in the shoe store were going to consummate a drug transaction that day. However, the search warrant for apartment 201 of the Sherbrooke Apartments was not issued that day, but two days later. Thus, the critical question is not what the Defendant may have done on February 8, 1988, but whether the affidavit contained sufficient information for a magistrate to conclude that there would be drugs in apartment 201 two days later, on February 10, 1988. Although the trial judge rejected this "staleness" argument, he repeatedly called it a "close question." (Tr. 3-3-89, 9, 14, 21). The Court of Appeals, applying the standard of review set forth in People v Russo, 439 Mich 584 (1992), correctly found that under the facts of this case, the information in the affidavit was stale, and there was otherwise no substantial basis for the magistrate to conclude that there was probable cause to issue a search warrant.

In Russo, this Court resolved a split in the Court of Appeals as to the standard for appellate review of the issuance of search warrants, holding that "appellate scrutiny of a magistrate's decision involves neither de novo review nor application of an abuse of discretion standard." Id., 439 Mich at 603. Instead, the reviewing court must determine "whether a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause," based on the search warrant affidavit. Id.

In People v Russo, this Court reaffirmed the principle that the staleness of information in the affidavit is a factor in the determination of probable cause. Under both the Michigan and federal constitutions, a search warrant must be supported by probable cause existing at the time the warrant is issued. Id., 439 Mich at 606-607; People v David, 119 Mich App 289 (1982), lv den 417 Mich 858 ("The passage of time is a valid consideration in deciding whether probable cause exists"). Probable cause or information which is stale--that is, which existed remote in time from the issuance of the warrant--may render a warrant invalid.

The United States Supreme Court first addressed this issue in Sgro v United States, 287 US 206, 77 L Ed 260, 53 S Ct 138 (1932). In Sgro, a warrant was issued to search a hotel for illegal intoxicants, based on information which was 21 days old. Holding that the search was unlawful, the Court stated, "...[I]t is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time...The new warrant must rest upon a proper finding and statement by the commissioner that probable cause then exists. That determination, as of that time, cannot be left to mere inference or conjecture."

A review of Michigan cases shows that under the facts of the present case, the Court of Appeals was clearly correct in finding that nothing Officer Bernhard observed on February 8, 1988 would show probable cause that drugs would be found in apartment 201 two days later.

In People v Siemieniec, 368 Mich 405 (1962), the Michigan Supreme Court held that a warrant was improperly issued on September 17 upon an affidavit of a police officer

stating that on September 13 he had observed the defendant making illegal sales of liquor on the premises to be searched. The Court stated that there "was nothing in the affidavit presented in this case to indicate that the acts observed on September 13 continued to occur on September 17." Id.

In the present case, there was at best a single negotiation for 1/2 kilogram of a some substance (the overheard conversation provided no information as to what substance-cocaine, marijuana or something else-the caller was talking about). There is even less probable cause here than in Siemieniac, where the police actually observed multiple sales out of the premises.

In People v Wright, 367 Mich 611 (1962), an officer observed illegal gambling equipment and liquor at a certain establishment six days prior to obtaining a search warrant. Holding that the officer's observations were too stale to support a finding of probable cause, the Supreme Court stated:

> "Powell's affidavit related facts six days stale. The factual situation presented by that affidavit, without more, was too remote to justify the issuance of a search warrant. We are left to surmise

> what information, if any, the police obtained from their intervening investigation and surveillance of defendant's premises. Failure to state what was observed during the investigation and surveillance described in the police officer's affidavit, permits an inference that nothing was observed to indicate that the offenses allegedly committed on February 18 continued to be committed at the time request was made on February 24 for the search warrant." 116 NW 2d at 788.

Again, the information in the present affidavit is even more insufficient than in Wright. In fact, there was no intervening surveillance or investigation between February 8th and February 10th which would corroborate Officer Bernhard's speculation that drugs would be found in apartment 201.

In People v David, supra, a confidential informant made a controlled buy of marijuana in the Defendant's trailer. A search warrant was issued three days later. Finding that the magistrate's decision to issue the warrant was error, the Court stated:

> "[I]n the case at bar, the affidavit alleged only a single sale, not

> continuing drug sales. The affidavit did not even state that defendant possessed any marijuana after he made the sale to the informant. On the facts presented to the magistrate, there is absolutely no evidence to suggest that defendant would still possess marijuana three days after the sale to the informant." 119 Mich App at 297 (Emphasis added).

There is, of course, no hard and fast rule as to how fresh information must be to support probable cause. Under Russo, that determination will depend on the facts of each case, and there may be situations involving a clear showing of ongoing criminal activity where 2-day old information may be sufficiently corroborated to show probable cause. In the present case, however, apart from the overheard conversation in the shoe store, there is absolutely nothing in the affidavit which would lead a person of reasonable caution to conclude that drugs would be found in apartment 201 two days later. Furthermore, there was nothing to show ongoing criminal activity in apartment 201 of Sherbrooke Apartments.

The fact that three "black males" were in a store, wearing what the officer believed to be expensive clothes and jewelry, and looking at $250 boots, is completely consistent with innocent activity.[1]

It is racist and offensive to imply that an African American who has the means and the desire to dress well is more likely to be a drug dealer than a similarly inclined Caucasian. Would the officer have been equally suspicious of three expensively dressed white people shopping for $250 shoes in Birmingham?

Also, the fact that apartment 201 had metal grates means nothing in a city where many people have such grates for reasons

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[1] In some cases, facts which are consistent with innocent conduct can create a suspicion which might justify an investigatory stop of the type described in Terry v Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868 (1968), but such innocent information cannot be aggregated to satisfy the more demanding requirements of probable cause. For example, in a number of so-called drug courier profile cases, the United States Supreme Court has upheld investigative Terry-stops of suspects, but has consistently rejected the proposition that the profile factors amount to probable cause. See, e.g., Florida v Royer, 460 US 491, 75 L Ed 2d 229, 103 S Ct 1319 (1983); Reid v Georgia, 448 US 438, 65 L Ed 2d 890, 100 S Ct 2752 (1980)(aggregation of innocent factors under the profile did not even amount to reasonable suspicion under Terry).

of personal security. Even Officer Bernhard admitted in his affidavit that some other apartments also had grates.

Bernhard's affidavit is also noteworthy for the information it does not contain. No sales, controlled or otherwise, were observed in the apartment. There was no pattern of heavy traffic, nor any other evidence of continuing criminal activity in the apartment. In fact, there was apparently no surveillance or investigation whatsoever in the two days between Bernhard's observations and the issuance of the search warrant. In short, there is nothing to show a pattern of criminal activity in apartment 201, other than the officer's speculation. The Court of Appeals in this case stated:

> "Although there may have been reason to believe that defendant and his companions were drug dealers, there was no reason to believe that the apartment in question was the location of a continuing criminal enterprise. There was no observation of a stream of visitors or any other evidence to suggest continuing criminal activity at the apartment. There was nothing to suggest that illegal narcotics were present in the apartment on February 8, 1988, or

> that, if present, the drugs would remain there until February 10, the day of the search. The officer saw no illegal substance and his conclusion that the apartment was used as a 'stash' house was mere speculation." Slip Opinion, p. 1 (Emphasis added).

The Court of Appeals properly applied the Russo test in reviewing the search warrant affidavit in this case, and correctly concluded that on these facts, there was no substantial basis for finding probable cause. The issue is not jurisprudentially significant, and the Court of Appeals opinion is not clearly erroneous. Therefore, Defendant-Appellee respectfully asks this Court to deny leave to appeal.

II. UNDER PRINCIPLES OF DOUBLE JEOPARDY, THE PROSECUTOR MAY NOT APPEAL A JUDGMENT VACATING A CONVICTION FOR INSUFFICIENT EVIDENCE.

The prosecutor argues that the Court of Appeals majority erred in finding insufficient evidence to support Defendant's conviction. Clearly, the bulk of the Court of Appeals opinion relies on the insufficiency of the search warrant affidavit to support probable cause, and its correct decision reversing the

conviction on that ground is sufficient reason to deny leave to appeal without reference to the sufficiency of the evidence issue.

However, assuming that the Court of Appeals decision is based also on the insufficiency of the evidence at trial under Jackson v Virginia, 443 US 307, 61 LEd2d 560, 99 SCt 2781 (1979) and People v Hampton, 407 Mich 354 (1979), cert den 449 US 885 (1980), the prosecutor is precluded from taking an appeal by leave on that issue. A prosecutor may appeal only under the express provisions of MCL 770.12; MSA 28.1109. People v Cooke, 419 Mich 420 (1984). Section 770.12(2) states that the prosecutor may take an appeal by leave in a criminal case only in "the protection against double jeopardy under section 15 of article I of the state constitution of 1963 and amendment V of the constitution of the United States would not bar further proceedings against the defendant." Applications for leave to appeal to the Michigan Supreme Court are included in this proscription, under sec. 2(c) of the statute. In People v Wolfe, 156 Mich App 225 (1986), the Court held that the statute

bars prosecutorial appeals of orders or judgments granting relief based on the sufficiency of the evidence.

For these reasons, this Court is without jurisdiction to hear the prosecutor's appeal of this issue.

In addition, to the extent that the Court of Appeals found the evidence at trial to be legally insufficient, that decision was correct, as nothing beyond Defendant's mere presence was shown. People v Burrell, 253 Mich 321 (1931).

SUMMARY AND RELIEF

WHEREFORE, Defendant-Appellee WILLIAM ADAMS asks this Honorable Court to deny leave to appeal.

Respectfully submitted,

GERALD A. SNIDERMAN (P25156)
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Dated: May 25, 1993

STATE OF MICHIGAN}
}
COUNTY OF WAYNE }

SEARCH WARRANT AND AFFIDAVIT

To the Sheriff or any peace officer of said county:

August Bernhart

Affiant, having subscribed and sworn to an affidavit for a Search Warrant, and I, having examined affiant under oath, am satisfied that probable cause exists:

THEREFORE, IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN, I command that you search the following described place:

The entire premises of apartment 201 of the Sherbrooke Garden Apartments located on the Southfield Expressway Service Drive, south of Eight Mile road in the City of Detroit. The apartment is the southern most apartment on the second floor and is in the name of J. Quinn (mailbox).

and to seize, secure, tabulate,, and make return according to law the following property and things: all suspected controlled

substances; all monies (or other assets), books, and records used in connection with illegal narcotics trafficking or the hiding of proceeds from illegal narcotics trafficking; all equipment and supplies used in the manufacture, delivery or sale of controlled substances; all firearms incendiary or explosive devices used in connection with the above described activities; all evidence of ownership, occupancy, possession or control of the premises.

The following facts are sworn to by affiant in support of the issuance of the Warrant:

Affiant is a police officer assigned to the Narcotic Section of the Detroit Police Department for the past 6 years.

On 8 February 1988, about 3PM, affiant was off duty and went to Scott Colburn's Saddlery at Farmington Road and Eight Mile to buy boots. While in the store, affiant saw 3 black males enter the store, all dressed in fur coats, wearing gold chains, and gold Rolex type watches. Two had pagers, and one had a portable cellular telephone. The three were there to purchase boots, and were looking at ones running some $250-$300. While there the

pagers went off and several calls were made by two of the three. Affiant's experience indicated that the dress, equipment, and actions of the three were characteristic of those in the drug trade. The phone calls on the cellular phone were made in the store and affiant was able to overhear a part of one call. In that call, the caller told someone to "give him the other half 'ki'". The caller went on to ask "do your have his number - if you don't I'll put in on you beeper." The caller then said, "we'll be at the apartment in about 15 minutes," and went on to say something about meeting "at the carwash."

Affiant, suspecting a dope deal was in progress, left the store and took up a position from which he could see the three leave the store and enter a white 1987 Acura. Affiant followed the Acura, which was going between 50 and 60 mph on Eight Mile, to the above described Sherbrooke Apartments. Affiant was able to get in position to see the three exit the Acura, remove something (probably packages from the boot store) from its trunk. The building is constructed motel-fashion so that the individual apartment entrances are on the outside, facing the

service drive. Affiant, by changing his location, watched the three go to the described apartment, which he later determined to be #201. The apartment had elaborate grates, unlike the other apartments, only a few of which had grates of any kind. By the time affiant returned to the position from which he had seen the Acura park in the rear of the building, the car was gone. The Acura could have been at the Sherbrooke Apartments for no more than a few minutes.

In light of the affiant's experience and the above described observations, affiant concludes that he three men rushed from the store to retrieve the dope from the apartment to deliver it elsewhere, presumably at a carwash. Affiant knows from personal knowledge that carwashes are often used as narcotic transfer points because their interiors are difficult for police to observe and a high traffic volume is common. Affiant concludes that apartment #201 is used as a safe or "stash" house. Affiant's knowledge of the narcotics trade indicates that weapons and/or explosive or incendiary devices are commonly used in connection therewith; that monies or other assets derived from

the trade are often found at the sites of narcotics related search warrant execution; and that records relating to narcotics transactions or the hiding of proceeds from such transactions are commonly kept in the course of illegal drug trafficking, and, likewise, are frequently found at the sites of search warrant executions.

/s/
AFFIANT

Subscribed and sworn to before me and issued under my hand this 10th day of February 1988. This warrant is to be executed within ___ hours.
APPROVED:
/s/
ASSISTANT PROSECUTING ATTORNEY

/s/
JUDGE OF 36TH Dist. Ct.
WAYNE COUNTY,
MICHIGAN
AND A MAGISTRATE

FILED
JUN 1 1994
OFFICE OF THE CLERK

No. 92-1831

In the Supreme Court of the United States

OCTOBER TERM, 1993

NORTHERN KENTUCKY WELFARE RIGHTS ASSOCIATION AND MICHELLE ASBURY, PETITIONERS

v.

BRERETON C. JONES, GOVERNOR OF KENTUCKY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a private party may bring an action against state officials under 42 U.S.C. 1983 to enforce a provision in 42 U.S.C. 8624(b)(2)(B) that identifies eligibility criteria under the Low-Income Home Energy Assistance Act of 1981, 42 U.S.C. 8621 *et seq*.

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No. 92-1831

NORTHERN KENTUCKY WELFARE RIGHTS ASSOCIATION AND MICHELLE ASBURY, PETITIONERS

v.

BRERETON C. JONES, GOVERNOR OF KENTUCKY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 2605(b)(1)-(2) of the Low-Income Home Energy Assistance Act of 1981, as amended, 42 U.S.C. 8624(b)(1)-(2) (1988 & Supp. IV 1992), and 45 C.F.R. 96.50 are reprinted at App., *infra*, 1a-4a .

STATEMENT

1. The Low-Income Home Energy Assistance Program (LIHEAP or the program) is governed by the Low-Income Home Energy Assistance Act (LIHEAA or the Act), which was enacted as part of the Omnibus Budget Reconciliation Act of 1981. See Pub. L. No. 97-35, Tit. XXVI, 95 Stat. 893 (codified as amended at 42 U.S.C. 8621-8629). Under the program, the Secretary of Health and Human Services is authorized to make grants to States to assist eligible households to meet the costs of home energy. 42 U.S.C. 8621.

To receive funds under the program, a State must submit an application to the Secretary. 42 U.S.C. 8624(a)(1). States have broad discretion to determine how to distribute those funds. Among the permissible options are providing assistance payments to eligible households; making payments directly to suppliers of home energy (see 42 U.S.C. 8624(b)(7)); providing credits against state taxes for energy suppliers that supply home energy at reduced rates to low-income households (see 42 U.S.C. 8624(*l*)); and funding low-cost residential weatherization or other energy-related home repairs for low-income households (see 42 U.S.C. 8624(k)). A State wishing to receive program funds submits to the Secretary each year a plan describing the eligibility requirements and benefit levels to be used for each type of assistance it will provide for that year. 42 U.S.C. 8624(a)(1) and (c).

A State's discretion over the disbursement of program funds is not unlimited. Of the federal funds it receives, the State must reserve until March 15 of each program year "a reasonable amount based on data from prior years" for "energy crisis intervention." 42 U.S.C. 8623(c). Funds not set aside for the "crisis program" are used for the "subsidy program." In addition, 42 U.S.C. 8624(a)(1) requires a State to submit an annual application containing "assurances by the chief executive officer of the State that the State will meet

the conditions enumerated in" 42 U.S.C. 8624(b). Section 8624(b) in turn requires that officer to "certify that the State agrees to" comply with a number of program requirements. The penultimate sentence of Section 8624(b) provides, however, that "[t]he Secretary may not prescribe the manner in which the States will comply with the provisions of this subsection."

2. The Commonwealth of Kentucky participates in LIHEAP. The Commonwealth's 1990 plan permitted any household with an income less than 110% of the Kentucky poverty level to receive assistance from that portion of program funds devoted to the crisis program. With regard to the 1990 subsidy program, however, Kentucky restricted eligibility to low-income households that included an elderly or disabled member. Pet. App. A5-A6.

Petitioners initially brought this action in the United States District Court for the Western District of Kentucky, challenging Kentucky's implementation of LIHEAP for fiscal year 1990.[1] Petitioners alleged that the Commonwealth's restriction of the subsidy program to households containing an elderly or disabled individual violated a provision in 42 U.S.C. 8624(b)(2)(B) that requires the certification by the Governor to represent that the State will not "exclud[e] from eligibility under this subclause [dealing with eligibility for program assistance by reason of household income] for payments under this subchapter * * * [any] household [that] has an income which is less than 110 percent of the poverty level for such State for such fiscal year."[2] Pet. App. A7. The

[1] Petitioners' complaint named as defendants the Governor, the Secretary of the Cabinet for Human Resources, and the Commissioner of that Cabinet's Department of Social Insurance. Only the Governor appealed the district court's initial decision, and his successor is the only remaining respondent. See Pet. App. D2-D3; Pet. 2-3 n.1.

[2] Petitioners also contended that Kentucky's plan violated 42 U.S.C. 8624(b)(5), which requires the governor to certify that the State agrees to

district court entered an injunction in favor of petitioners, but the court of appeals held that the lower court had abused its discretion in denying respondent's motion for a change of venue, and remanded the case with instructions to transfer it to the Eastern District of Kentucky. *Id.* at D1-D23.

While the case was pending in the Eastern District, the court of appeals decided a similar case concerning Kentucky's LIHEAP participation for fiscal year 1991. *Cabinet for Human Resources* v. *Northern Kentucky Welfare Rights Ass'n*, 954 F.2d 1179 (6th Cir. 1992) (*reprinted at* Pet. App. C1-C44).[3] In that case, the court held that LIHEAA creates no private federal right of action (express or implied) to enforce its terms, at least prior to exhaustion of state administrative remedies (Pet. App. C17-C29); that the Act's comprehensive enforcement scheme forecloses recognition of any further remedy under 42 U.S.C. 1983 (Pet. App. C30-C31); and that the Act creates no federal rights enforceable under Section 1983 (Pet. App. C31-C44). On the basis of *Cabinet for Human Resources*, the district court in this case held that 42 U.S.C. 8624(b)(2) does not create a right enforceable under Section 1983. Pet. App. B1-B2.

The court of appeals affirmed. Pet. App. A1-A12. The court rejected petitioner's attempt to distinguish *Cabinet for Human Resources* as involving different provisions of the

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provide that "the highest level of assistance will be furnished to those households which have the lowest incomes and the highest energy costs in relation to income, taking into account family size." Pet. App. A6-A7. Petitioners do not renew that contention here.

[3] In *Cabinet for Human Resources*, the plaintiffs alleged that the 1991 Kentucky plan improperly used the amount of energy costs allowed public housing tenants in calculating income (cf. 42 U.S.C. 8624(f)(1)), failed to treat owners and renters equitably (see 42 U.S.C. 8624(b)(8)(B)), and did not afford the highest benefits to applicants with the lowest incomes and highest costs in relation to income (see 42 U.S.C. 8624(b)(5)). See Pet. App. A8, C13.

Act. Pet. App. A10-A11. It held that petitioners could challenge Kentucky's implementation of LIHEAP only through the State's own administrative process or by invoking the provisions of the statute that require the Secretary to investigate complaints and withhold funds from "any State which does not utilize its allotment substantially in accordance with the . . . assurances such State provided under Section 8624." *Id.* at A11-A12 (quoting 42 U.S.C. 8627(a)(1)).

DISCUSSION

1. At the outset, we note the possibility that this case is moot.[4] Petitioners' complaint sought a declaratory judgment that Kentucky's LIHEAP for fiscal year 1990 violated petitioners' federal statutory rights, and an order enjoining state officials from excluding petitioners from participation in the 1990 subsidy program and requiring them to comply with the assurances made by the State to the Secretary in connection with participation in the program for that year. Compl. 21-22. The complaint does not appear to seek relief regarding Kentucky's LIHEAP for any fiscal year other than 1990. Moreover, because it was brought against state officials in their official capacities, the suit may seek only prospective injunctive relief. See *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989).

LIHEAP is annually funded, and once a State has expended its program funds for a particular fiscal year, even persons eligible for funding under a State's program will receive no

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[4] The court of appeals noted the possibility of mootness in its decision on the first appeal, Pet. App. D3-D4, but ultimately remanded on venue grounds without addressing the mootness issue. *Id.* at D23. On remand, neither the district court's brief order dismissing the case (*id.* at B1-B2) nor the court of appeals' decision affirming that disposition (*id.* at A1-A12) considered whether the case was moot. Neither party has addressed the issue in this Court.

funds. We have been informed by the Department of Health and Human Services that all funds available under the Kentucky LIHEAP for fiscal 1990 have been distributed. Moreover, the injunction initially entered by the District Court for the Western District of Kentucky in this case (see Pet. App. A2, D8-D9) was not vacated on venue grounds until May 24, 1991 (see *Northern Kentucky Welfare Rights Ass'n* v. *Wilkinson*, 933 F.2d 1009 (6th Cir. 1991) (Table) (noting judgment accompanying decision reprinted at Pet. App. D1-D23)), which was well after the expiration of fiscal year 1990 on September 30, 1990. It therefore appears that petitioners were in fact treated as eligible for participation in the Commonwealth's 1990 LIHEAP, all the funds from which have in any event already been distributed. Because the complaint sought nothing more, and because no further prospective relief could be ordered with respect to the 1990 program, the case would appear to be moot.

2. a. Section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. Petitioners' claim in this case is based on a law of the United States—a provision of the Low-Income Home Energy Assistance Act, 42 U.S.C. 8624(b)(2). Because "Section 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law," *Golden State Transit Corp.* v. *Los Angeles*, 493 U.S. 103, 106 (1989), it is necessary to determine whether LIHEAA "creates a 'federal right' that is enforceable under § 1983." *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990). The Court stated in *Wilder* that such an inquiry turns first on whether the particular statutory provision was intended to benefit the putative plaintiff. *Ibid.* If so, the provision will be held to create an enforceable right unless (i) it merely expresses a "congressional preference" for particular conduct, rather than imposing a binding obligation on the State, *Pennhurst State School & Hosp.* v. *Halderman*, 451

U.S. 1, 19 (1981), or (ii) the interest the plaintiff asserts is "too vague or amorphous" and therefore "beyond the competence of the judiciary to enforce," *Golden State*, 493 U.S. at 106 (quoting *Wright* v. *Roanoke Redev. & Housing Auth.*, 479 U.S. 418, 423 (1987)). See *Wilder*, 496 U.S. at 509. Finally, no right will be held enforceable under Section 1983 if "Congress has foreclosed such enforcement," Pet. App. 508, either explicitly in the terms of the statute itself, or implicitly by providing a specific remedial scheme sufficiently compre-hensive to indicate an intention to preclude reliance on the more general mechanism of Section 1983. See 496 U.S. at 520-523.

Wilder upheld a suit by Medicaid providers under Section 1983 to enforce a provision of the Medicaid Act known as the Boren Amendment. See 496 U.S. at 524. A State desiring federal funding under that Act is required to submit for the Secretary's approval a plan describing the State's Medicaid program, and the Boren Amendment required that such a plan provide payment for medical services at rates

> which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws.

Id. at 503 (quoting 42 U.S.C. 1396a(a)(13)(A) (Supp. V 1987)).

In concluding that the Boren Amendment conferred on health care providers rights enforceable under Section 1983, the Court rejected the argument that the Amendment required no more than assurances made by the State to the Secretary, and that such assurances gave rise to no privately enforceable rights. Focusing on the statutory requirement that the State "fin[d]" its rates "reasonable and adequate" as a "necessary prerequisite" to making its assurances, the Court

held that "it would make little sense for Congress to require a State to make findings without requiring those findings to be correct." 496 U.S. at 512-515 & n.11. From an examination of the background and legislative history of the Boren Amendment, the Court concluded that Congress had intended to ensure substantive compliance by the States with the "reasonable and adequate" cost requirement, and rejected the argument that the requirement was too "vague and amorphous" to be judicially enforceable. *Id.* at 515-520. The Court emphasized that the statute and regulations "set out factors which a State must consider in adopting its rates," and provided "objective benchmark[s]" against which to measure the accuracy of a State's findings. *Id.* at 519-520 & n.17.

Finally, having found that the statute was intended to confer "enforceable rights" on Medicaid providers, the Court rejected the argument that the statute's own enforcement provisions were sufficient to preclude reliance on Section 1983. 496 U.S. at 520-523. The Court acknowledged the requirement that the State provide procedures for review of established rates, as well as the Secretary's ability to withhold approval of state plans or curtail payment of federal funds as sanctions for noncompliance with the Act. But the Court held that those state and federal administrative remedies "[could not] be considered sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983." *Id.* at 522.

b. In *Suter* v. *Artist M.*, 112 S. Ct. 1360 (1992), the Court held that there was no right of action under Section 1983 to enforce a provision of the Adoption Assistance and Child Welfare Act of 1980 (the Adoption Act), 42 U.S.C. 620-628, 670-679a. That Act, like the Medicaid Act, establishes a federal reimbursement program for certain services provided by the States, and requires that States wishing to participate in the reimbursement program submit for approval by the Secretary a plan containing various assurances, specified in the Act,

concerning the way in which the federal funds will be spent. 112 S. Ct. at 1363-1364. *Suter* involved the assurance required by 42 U.S.C. 671(a)(15) that the State's plan must

> provid[e] that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

See 112 S. Ct. at 1364.

Suter recognized that *Wilder* had involved both a facially similar statutory scheme (requiring submission of a state plan containing specified "assurances") and statutory language centering on "reasonable" action by the State. See 112 S. Ct. at 1367-1368. The Court emphasized, however, that in ascertaining the existence of federal rights enforceable under Section 1983, "each statute must be interpreted by its own terms," by "analyz[ing] the statutory provisions in detail, in light of the entire legislative enactment." *Id.* at 1367 & n.8. The Court framed the question as whether "Congress, in enacting the Adoption Act, unambiguously confer[red] upon the child beneficiaries of the act a right to enforce the requirement" of "reasonable efforts" reflected in the State's assurance to the Secretary. *Id.* at 1367.

In answering that question, the Court first "examine[d] exactly what is required of States by the Act." 112 S. Ct. at 1367. The Court remarked that the statute at issue in *Wilder*, and the accompanying regulations, "set forth in some detail the factors to be considered in determining the methods for calculating rates." *Id.* at 1368; see also *id.* at 1369 n.13 (discussing guidance furnished by implementing regulations in *Wright*). The Act at issue in *Suter*, by contrast, provided "[n]o further statutory guidance as to how 'reasonable efforts' are to be measured." *Id.* at 1368. The Court pointed out that the meaning of the "reasonable efforts" that must precede

placement of a child in foster care would "obviously vary with the circumstances of each individual case," and "[h]ow the State was to comply with this directive * * * was, within broad limits, left up to the State." *Ibid.* Moreover, the Secretary's regulations were "not specific" with respect to what constitutes "reasonable efforts," and "[did] not evidence a view that § 671(a) places any requirement for state receipt of federal funds other than the requirement that the State submit a plan to be approved by the Secretary." *Id.* at 1369. Similarly, the Court noted that while the legislative history of the Adoption Act showed that "Congress was concerned that the required reasonable efforts be made by the States," it "also indicated that the Act left a great deal of discretion to them." *Ibid.* & n.15.

Finally, the Court noted that the Secretary had authority under the Adoption Act to reduce or eliminate payments to a State as a result of any failure to comply with the Act or any "substantial" failure to comply with the State's own plan, and that in each case of an involuntary removal of a child from his or her home, the Act required a state judicial determination that the "reasonable efforts" requirement had been fulfilled. 112 S. Ct. at 1368. The Court did not decide whether those explicit remedies were sufficiently comprehensive "to manifest Congress' intent to foreclose remedies under § 1983"; but, the Court concluded, "they [did] show that the absence of a remedy to private plaintiffs under § 1983 [did] not make the reasonable efforts clause a dead letter." *Id.* at 1368-1369 & n.11; compare *Wilder*, 496 U.S. at 514.

On the basis of the foregoing indicia of congressional intent, the Court concluded that the "reasonable efforts" language in 42 U.S.C. 671(a)(15) did not "unambiguously confer an enforceable right upon the Act's beneficiaries." 112 S. Ct. at 1370. Rather, the term "reasonable efforts" in that context could be "at least as plausibly read to impose only a

rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary." *Ibid.*

3. The lower courts have discerned some tension between *Wilder* and its predecessors on the one hand, and *Suter* on the other. The courts have attempted to reconcile the cases and synthesize their approaches by supplementing the general analytical framework set out in *Wilder* and its predecessors with a particular focus, in the context of the entire legislative enactment, on the existence of the sort of specific, mandatory, and judicially enforceable statutory command to the States that this Court found wanting in *Suter*. See, *e.g.*, *Howe* v. *Ellenbecker*, 8 F.3d 1258, 1261-1263 & n.5 (8th Cir. 1993), cert. denied, 114 S. Ct. 1373 (1994); *Albiston* v. *Maine Comm'r of Human Servs.*, 7 F.3d 258, 261-264 (1st Cir. 1993); *Arkansas Medical Soc'y, Inc.* v. *Reynolds*, 6 F.3d 519, 524-528 (8th Cir. 1993); *Procopio* v. *Johnson*, 994 F.2d 325, 330-332 & n.9 (7th Cir. 1993); *Resident Council of Allen Parkway Village* v. *HUD*, 980 F.2d 1043, 1051-1053 (5th Cir.), cert. denied, 114 S. Ct. 75 (1993); *Stowell* v. *Ives*, 976 F.2d 65, 68-70 (1st Cir. 1992); *Clifton* v. *Schafer*, 969 F.2d 278, 283-285 (7th Cir. 1992). The court below recently adopted the same approach. *Horn* v. *Madison County Fiscal Court*, No. 92-6010 (Apr. 21, 1994), slip op. 4-9.

Following that approach, the courts of appeals have not reached conflicting results under LIHEAA or any similar statute since *Suter*, and further review of the decision below would therefore be premature. Moreover, LIHEAA has an unusual statutory and regulatory background that may suggest a Congressional intention to insulate participating States, in general, from enforcement other than through the federal administrative scheme. Thus, while it may at some point become necessary for the Court to provide further guidance in this area, we do not believe that course is called for now.

a. The brief decision below did not mention, let alone discuss, this Court's decision in *Suter*. It relied entirely on the Sixth Circuit's prior decision in *Cabinet for Human Resources*, Pet. App. C1-C44, which analyzed LIHEAA in some detail, but which was decided before *Suter*. Indeed, in its recent decision discussing the application of Section 1983 in light of *Wilder* and *Suter*, the court below did not even advert to its prior decision in this case. See *Horn* v. *Madison County Fiscal Court*, *supra*.

Petitioners are correct (Pet. 11-16) that the decision below and the Fourth Circuit's decision in *Hunt* v. *Robeson County*, 816 F.2d 150 (1987), conflict with the Eighth Circuit's decision in *Crawford* v. *Janklow*, 710 F.2d 1321 (1983), which held that a suit may be brought under Section 1983 based on an alleged violation of LIHEAA. But *Crawford*, like *Hunt*, also arose before *Suter*—indeed, before *Wilder* and *Golden State*. Thus, none of the conflicting decisions discusses the effect of this Court's most recent precedent.[5] The Eighth Circuit has applied *Suter* in considering whether two other federal statutes create rights enforceable under Section 1983 (see *Howe* v. *Ellenbecker*, *supra*; *Arkansas Medical Soc'y, Inc.* v. *Reynolds*, *supra*), but it has not had occasion to revisit its holding in *Crawford* in light of *Suter*. If and when it does, it

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[5] Petitioners contend (Pet. 13-14) that the decision below also conflicts with the Second Circuit's decision in *Rodriguez* v. *Cuomo*, 953 F.2d 33 (1992). That decision, which was also rendered prior to *Suter*, did not consider the threshold issue of the availability of a cause of action under Section 1983, and thus does not give rise to a true conflict on that issue. See *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 119 (1984) (cases addressing merits without discussing jurisdiction do not resolve jurisdictional issue). Moreover, on the merits, *Rodriguez* considered and rejected a claim under 42 U.S.C. 8624(b)(2)(B) that is very similar to the one made by petitioners in this case. Thus, there is no conflict in ultimate result (*i.e.*, the denial of relief) between the decision below and *Rodriguez*.

may agree with the result reached in this case and in *Hunt*.[6] In any event, although this Court may eventually be required to clarify the relationship between *Wilder* and *Suter*, it would be premature to do so unless the courts of appeals reach conflicting results after full consideration of both cases in a particular statutory context.

b. As it comes to the Court, this case involves only the certification made by Kentucky to the Secretary under 42 U.S.C. 8624(b)(2)(B): that it would not "exclud[e] from eligibility under this subclause for payments under this subchapter * * * [any] household [that] has an income which is less than 110 percent of the poverty level for such State for such fiscal year." Under the general framework for evaluating the existence of a private right enforceable under Section 1983, we think it clear that in mandating such a certification, Congress intended to confer some concrete benefit on individuals like petitioners—potential LIHEAP

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[6] The plaintiffs in *Crawford* alleged that South Dakota's LIHEAP plan violated 42 U.S.C. 8624(b)(5), which requires the governor to certify that the State agrees to provide that "the highest level of assistance will be furnished to those households which have the lowest incomes and the highest energy costs in relation to income, taking into account family size." In light of the generality of that standard—as well as the text, background, and implementation of LIHEAA (see pages 16-19, *infra*)—*Suter* may well cause the Eighth Circuit to reexamine its conclusion in *Crawford* that a cause of action lies under Section 1983 to enforce 42 U.S.C. 8624(b)(5). It is also significant in this regard that *Crawford* did not address whether 42 U.S.C. 8624(b)(5) is "too vague and amorphous" to be enforced by a court. That standard was clearly articulated in *Wilder*, 496 U.S. at 509, and *Golden State*, 493 U.S. at 106, both of which were decided after *Crawford*. Compare *Horn* v. *Madison County Fiscal Court*, slip op. 6-7.

Although the Eighth Circuit rendered two decisions soon after *Crawford* in Section 1983 actions brought to enforce LIHEAA, neither addressed the existence of a cause of action under Section 1983, presumably because *Crawford* had so recently decided that issue. See *Clifford* v. *Janklow*, 733 F.2d 534 (1984); *Crawford* v. *Janklow*, 733 F.2d 741 (1984).

beneficiaries whose household income falls below the specified threshold. See *Wilder*, 496 U.S. at 509.

Nor does Section 8624(b)(2)(B) appear to come within either of the exceptions to recognition of an "enforceable right" under the *Wilder* framework. 496 U.S. at 509. Unlike the "general statement of 'findings'" that was held in *Pennhurst* to express only a "congressional preference" (451 U.S. at 19), 42 U.S.C. 8624(b) requires a participating State to "certify" that the State "agrees" to certain conditions on federal funding, including the eligibility criteria of Section 8624(b)(2)(B).[7] That certification is evidently meant to represent a "binding obligation" undertaken by the State. See *Wilder*, 496 U.S. at 509. Moreover, although there is room for dispute as to what exactly the State's certification obligates it to do—the issue on the merits in this case (see note 5, *supra*)—neither the relevant text of 42 U.S.C. 8624(b)(2)(B) nor the interest plaintiffs advance under that text is so "vague and amorphous" as to elude effective judicial resolution. See *Wilder*, 496 U.S. at 509. Unlike the "reasonable efforts" provision at issue in *Suter*, application of which would necessarily "vary with the circumstances of each individual case" (112 S. Ct. at 1368), the certification required under Section 8624(b)(2)(B) imposes a categorical limitation on the income eligibility criteria that a State may establish under LIHEAP. Whatever limitation that certification imposes, it imposes with respect to all applicants for benefits under a State's program (see 42 U.S.C. 8624(b)(8)(A); *Rodriguez* v. *Cuomo*, 953 F.2d at 36-39); and determining what it requires

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[7] The terms "certify" and "agrees" in Section 8624(b) are significantly more mandatory (or explicitly contractual) in import than the statutory language at issue in either *Wilder* or *Suter*. See *Wilder*, 496 U.S. at 503 (rates "the State finds, and makes assurances satisfactory to the Secretary, are reasonable"); *Suter*, 112 S. Ct. at 1364 (State "shall have a plan approved by the Secretary which * * * provides").

presents a routine interpretive question well within the competence of the courts.

The decision in *Suter* suggests that States participating in a federal grant program must have received fair notice of the possibility of private enforcement of program requirements intended for the benefit of private persons before the beneficiaries will be allowed to enforce them under Section 1983. See *Suter*, 112 S. Ct. at 1366-1367, 1369-1370; see also *Pennhurst*, 451 U.S. at 17. But any such "notice" requirement must, we think, be understood in light of the usual rule, reflected in this Court's prior cases, that federal rights that are stated in sufficiently specific and mandatory terms in the statute (perhaps as supplemented by implementing regulations) are subject to enforcement through Section 1983. See, *e.g.*, *Wilder*, 496 U.S. at 508-509 & n.9; *Wright*, 479 U.S. at 423-424; *Maine* v. *Thiboutot*, 448 U.S. 1, 4-8 (1980). Thus, a State participating in a federal program would ordinarily be expected to foresee that such requirements of a federal law, to which it has bound itself by participation in a federally funded program, may be subject to private enforcement under Section 1983—in the absence of a comprehensive enforcement scheme or other indicia of congressional intent to foreclose an action under Section 1983.

The certification required by 42 U.S.C. 8624(b)(2)(B), considered by itself, unambiguously commits any State applying for federal funds under LIHEAA to observe a substantive restriction on the limits it may set on income eligibility for program benefits. As noted above, there is room for dispute as to the exact content of that restriction. Except where a federal condition is "too vague and amorphous" to be enforced (see *Wilder*, 496 U.S. at 509), however, or where its application will necessarily "vary with the circumstances of each individual case" (*Suter*, 112 S. Ct. at 1368), disagreement about its meaning relates primarily to the merits of a

plaintiff's case, and does not provide the answer to the threshold question of the defendant's amenability to suit under Section 1983. In this case, Kentucky unquestionably undertook to comply with a specific, mandatory eligibility condition on the receipt and disbursement of federal funds. Under normal circumstances, the Commonwealth could not later claim surprise that putative beneficiaries of that condition who believed it had been violated would seek relief in an action under Section 1983.

The circumstances in this case are not, however, entirely normal. LIHEAA specifically provides that "[t]he Secretary may not prescribe the manner in which the States will comply with the provisions of" 42 U.S.C. 8624(b), which sets forth the certifications the State must make. 42 U.S.C. 8624(b) (concluding language following subsection (b)(14)). Moreover, in the legislative history of the 1981 amendments to LIHEAA and several other "block grant" programs, Congress made clear its purpose to "return basic control and responsibility [for the programs] to the State level." S. Rep. No. 139, 97th Cong., 1st Sess. 910-911 (1981). Thus, the Senate Report expressed the intent "that States be provided with the broadest possible latitude in the use of block grant funds and be free from all but the most minimal and necessary federal administrative and regulatory direction," and "specifically directed [the Secretary] not to interpret [the Act's] requirements by regulation[,] or otherwise go beyond the explicit boundaries of the limited federal role clearly defined in the [Act]." *Id.* at 908-909; see *Rodriguez* v. *Cuomo*, 953 F.2d at 38-39. Consistent with that legislative history, the Secretary's implementing regulations provide explicitly that under LIHEAP and six other block grant programs "the States are primarily responsible for interpreting the governing statutory provisions," and that "[i]n resolving any issue raised by a complaint or a Federal audit the [Secretary] will defer to a State's interpretation of its assurances and of

the provisions of the block grant statutes unless the interpretation is clearly erroneous." 45 C.F.R. 96.50(e) (reprinted at App., *infra*, 2a-4a).

The distinctive legislative history and regulatory implementation of LIHEAA therefore manifest a principle of deference to the States, and a corresponding absence of federal administrative guidance, to such a degree as to suggest that any doubts under the usual analysis in this area should be resolved against recognition of a right of action under Section 1983 to enforce the certification requirements in 42 U.S.C. 8624(b). At least that would appear to be so with respect to enforcement of those requirements (such as the one in 42 U.S.C. 8624(b)(5) that assistance must be furnished to households with the lowest income and highest energy needs in relation to income) that are stated in rather general terms and call for the exercise of judgment by the States in fashioning their programs. Cf. *Rodriguez* v. *Cuomo*, 953 F.2d at 38-39.[8]

c. LIHEAA prescribes a federal administrative scheme for its enforcement. First, the Act provides for federal compliance audits, by the Secretary or the Comptroller

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[8] Even in this context of deference to the States, however, the particular provision petitioners seek to enforce—which bars a State from excluding from eligibility households whose income is less than 110% of the State's poverty level, 42 U.S.C. 8624(b)(2)(B)—may be stated with sufficient specificity to be privately enforceable under Section 1983. Cf. *Rodriguez* v. *Cuomo*, 953 F.2d at 39 (declining to defer to State's interpretation of 42 U.S.C. 8624(b)(2)(B), compare *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), although subsequently agreeing with that interpretation). Nonetheless, we do not believe that the question whether that particular provision of LIHEAA is privately enforceable in an action under Section 1983 presents an issue of sufficient importance to warrant review by this Court. The only other appellate decision concerning that provision was the Second Circuit's decision in *Rodriguez*, which did not address the availability of an action under Section 1983 and which, moreover, denied relief on the merits. See note 5, *supra*.

General, of several States each year (and of any State whose program gives rise to a "pattern" of complaints), and it directs the Secretary to withhold funds from any State that does not use federal funds "substantially in accordance with the provisions of [LIHEAA] and the assurances such State provided under section 8624." 42 U.S.C. 8627(a) and (b). Under the regulations implementing LIHEAP and the six other block grant programs, the Secretary may also order a participating State to repay any amount not expended "in accordance with law o[r] the certifications provided by the State." 45 C.F.R. 96.51(a). LIHEAA requires the Secretary to respond initially within 60 days to any complaint "of a substantial or serious nature" that a State has failed to use program funds in accordance with the Act or its assurances under 42 U.S.C. 8624, and provides that a complaint that a State has violated an assurance is to be considered "serious" if the alleged violation "constitutes a disregard of such assurance." 42 U.S.C. 8627(a)(2). Such a complaint may be filed with the Secretary by any interested party, including potential beneficiaries such as petitioners. See Pet. App. A11-A12; compare *Wilder*, 496 U.S. at 522 (discussing regulatory scheme involved in *Wright*, 479 U.S. at 428). The regulations do not require a hearing on complaints (although the Secretary will conduct an investigation where appropriate, 45 C.F.R. 96.50(c)), and they do not provide for an administrative appeal when a complaint is rejected.[9]

LIHEAA's enforcement provisions may not be sufficiently comprehensive to demonstrate, by themselves, an affirmative congressional intention to foreclose additional remedies under Section 1983. See *Wilder*, 496 U.S. at 520-523; compare *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 13-15, 20-21 (1981). But they do

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[9] The regulations do require a hearing before the Secretary may withhold or order repayment of program funds. 45 C.F.R. 96.51.

demonstrate that if LIHEAA's certification requirements are not enforceable in an action under Section 1983, they are not thereby rendered "dead letter[s]." *Suter*, 112 S. Ct. at 1368-1369. And together with 45 C.F.R. 96.50(e)'s regulatory assurance of federal deference in matters of statutory interpretation, as well as the legislative history's forceful articulation of a limited federal role in administering the program, the enforcement provisions can reasonably be understood as part of an overall statutory and regulatory framework that implies an absence of private enforcement under Section 1983. Compare *Suter*, 112 S. Ct. at 1368 (noting lack of regulatory guidance and that compliance with statutory directives was, "within broad limits, left up to the State").

d. In sum, while we disagree with some of the Sixth Circuit's reasoning in *Cabinet for Human Resources* and this case (see, *e.g.*, Pet. App. C43, determining that Congress was "suggesting instead of mandating" compliance with program requirements set out in 42 U.S.C. 8624), that court's conclusion that actions may not be brought under Section 1983 to enforce the certification requirements in 42 U.S.C. 8624(b) may well be correct, at least as a general matter. In our view, however, that conclusion depends heavily on the unusual statutory and regulatory setting described above. Because that setting is atypical—and because of the absence of a conflict among the circuits involving LIHEAA itself or an analogous statute—this case would not be an appropriate vehicle for further consideration by this Court of broader questions about the circumstances under which a cause of action will lie under Section 1983 to secure compliance with standards governing federally funded programs. Those broader questions do not in any event warrant review by the Court at this time, because the lower courts are in general agreement about the manner in which the teachings of *Wilder*

and *Suter* may be synthesized, and about the resulting framework for application of Section 1983.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] We note as well that a bill has been introduced in Congress to amend the Social Security Act to direct that in an action to enforce any provision of that Act, the provision "is not to be deemed unenforceable because of its inclusion in a section of the Act requiring a State plan or specifying the required contents of a State plan." S. 1668, 103d Cong., 2d Sess. § 310(a) (1994). The proposed amendment further provides that it "is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in [*Suter*], but not applied in prior Supreme Court decisions respecting such enforceability." *Ibid.*

APPENDIX

1. Section 2605(b) of the Low-Income Home Energy Assistance Act of 1981, as amended, 42 U.S.C. 8624(b) (1988 & Supp. IV 1992), provides as follows:

> As part of the annual application required by subsection (a) of this section, the chief executive officer of each State shall certify that the State agrees to—
>
> * * * * *
>
> (2) make payments under this subchapter only with respect to—
>
> (A) households in which 1 or more individuals are receiving —
>
> (i) aid to families with dependent children under the State's plan approved under part A of title IV of the Social Security Act [42 U.S.C. 601 et seq.] (other than such aid in the form of foster care in accordance with section 408 of such Act) [42 U.S.C. 608];
>
> (ii) supplemental security income payments under title XVI of the Social Security Act [42 U.S.C. 1381 et seq.];
>
> (iii) food stamps under the Food Stamp Act of 1977 [7 U.S.C. 2011 et seq.]; or
>
> (iv) payments under section 415, 521, 541 or 542 of title 38, or under section 306 of the

Veterans' and Survivors' Pension Improvement Act of 1978; or

(B) households with incomes which do not exceed the greater of—

(i) an amount equal to 150 percent of the poverty level for such State; or

(ii) an amount equal to 60 percent of the State median income;

except that no household may be excluded from eligibility under this subclause for payments under this subchapter for fiscal year 1986 and thereafter if the household has an income which is less than 110 percent of the poverty level for such State for such fiscal year[.]

2. 45 C.F.R. 96.50 provides in pertinent part as follows:

Complaints.

(a) This section applies to any complaint (other than a complaint alleging violation of the nondiscrimination provisions) that a State has failed to use its allotment under a block grant in accordance with the terms of the act establishing the block grant or the certifications and assurances made by the State pursuant to that act. The Secretary is not required to consider a complaint unless it is submitted as required by this section.

(b) Complaints with respect to the health block grants must be submitted in writing to either the Assistant Secretary for Health or: For the preventive health and health services block grant, the Director, Centers for Disease Control; for the alcohol and drug abuse and mental health services block grant, the Administrator, Alcohol,

Drug Abuse, and Mental Health Administration; for the maternal and child health services block grant, the Administrator, Health Resources and Services Administration. Complaints with respect to the social services block grant must be submitted in writing to the Assistant Secretary for Human Development Services. Complaints with respect to the low-income home energy assistance program and the community services block grant must be submitted in writing to the Director, Office of Community Services. (The address for the Director, Center[s] for Disease Control is 1600 Clifton Road, NE., Atlanta, Georgia 30333. For each of the other officials cited above the address is 200 Independence Avenue SW., Washington, DC 20201.) The complaint must identify the provisions of the act, assurance, or certification that was allegedly violated; must specify the basis for the violations it charges; and must include all relevant information known to the person submitting it.

(c) The Department shall promptly furnish a copy of any complaint to the affected State. Any comments received from the State within 60 days (or such longer period as may be agreed upon between the State and the Department) shall be considered by the Department in responding to the complaint. The Department will conduct an investigation of complaints where appropriate.

(d) The Department will provide a written response to complaints within 180 days after receipt. If a final resolution cannot be provided at that time, the response will state the reasons why additional time is necessary. Under the low-income home energy assistance program, within 60 days after receipt of complaints, the Department will provide a written response to the complainant, stating the actions that it has taken to date and the timetable for final resolution of the complaint.

(e) The Department recognizes that under the block grant programs the States are primarily responsible for

interpreting the governing statutory provisions. As a result, various States may reach different interpretations of the same statutory provisions. This circumstance is consistent with the intent of and statutory authority for the block grant programs. In resolving any issue raised by a complaint or a Federal audit the Department will defer to a State's interpretation of its assurances and of the provisions of the block grant statutes unless the interpretation is clearly erroneous. In any event, the Department will provide copies of complaints to the independent entity responsible for auditing the State's activities under the block grant program involved. Any determination by the Department that a State's interpretation is not clearly erroneous shall not preclude or otherwise prejudice the States auditors' consideration of the question.